

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 858 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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CHHAGAN AKHAI HARIJAN

Versus

STATE OF GUJARAT

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Appearance:

MR CH VORA for appellant

MR ST MEHTA APP for Respondent No. 1

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CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 23/07/98

ORAL JUDGEMENT

1. This criminal appeal is filed by the appellant, convict/ accused challenging the order of conviction and sentence dated 7.9.1988 passed by the learned Sessions Judge, Kutch-Bhuj, in Sessions Case No. 5 of 1988 for the offence punishable under Section 354 of Indian Penal Code ("IPC" for short).

2. The prosecution case in nutshell as per the First

Information Report is as under:

2.1 On 13.7.1984, when Jyotsnaben, aged about 14 years was going for attending natural call at about 8 A.M., the appellant/accused aged about 20 years, came abruptly and caught hold and assaulted her with intent to outrage her modesty. When she shouts, the appellant fled away from the scene. Thereafter she went to her house and informed about the said incident to her father. Her father informed Punjabhai Vishrambhai Patel, the Sarpanch of Anandpar village about the incident. Thereafter the appellant was called by the Sarpanch and inquired about the alleged incident. The appellant admitted the guilt and apologized for the same. After alleged episode was over, at about 3 P.M. father of the appellant called the father of the victim Jyotsnaben and inquired as to why he was defaming his son. Father of the victim said to the father of the appellant that his son had confessed his guilt in presence of the Sarpanch and he may inquire in that regard. At that time father of the appellant who was accompanied by other persons got excited and assaulted the father of the victim and caused injuries to him. Father of the appellant also gave him threat saying that if he defames his son they would kill him. The said occurrence was reported to the concerned police station of Nakhatrana and on the basis of the said report crime was registered for the commission of offence under Section 354 of the IPC.

2.2 During the investigation it was revealed that the appellant had also committed offence under Sections 323 and 376 of IPC. Both these sections were added and report in that regard was sent to the concerned Magistrate and investigation in respect of the said offences was also carried out. On completing necessary investigations the accused was charge-sheeted and after committal he was tried by the learned Sessions Judge, Kutch-Bhuj in Sessions Case No.5 of 1988.

3. On consideration of the evidence, the learned Sessions Judge came to the conclusion that the prosecution has failed to prove the charge of rape and hurt under Sections 376 and 323 of IPC against the accused. Therefore, he recorded finding of acquittal in respect of the said offences. However, he came to the conclusion that the accused did commit the offence of assault with intent to outraging modesty of the victim punishable under section 354 of IPC and, therefore, he was held guilty for the said offence and was sentenced to suffer R.I. for one year. It is this finding of recording of conviction under Section 354 of IPC which is

the subject matter of challenge before this Court.

4. At the time of hearing of this appeal, the learned advocate for the appellant Mr. Vora stated that the prosecution has exaggerated the story in all respects and the offence of rape and hurt was added after one year during the investigation. Therefore, the learned trial Judge was rightly observed that it is an exaggerated story at all levels and, therefore, commission of offence under sections 376 and 323 of IPC was rightly not believed and thereby major offence was not believed by the learned trial Judge. Mr. Vora further submitted that the learned trial Judge has committed grave error in believing that the accused has committed offence under Section 354 of IPC. He further submitted that inspite of the fact that there is ample evidence to show that the prosecution case suffers from grave infirmities the learned trial Judge recorded conviction under Section 354 of IPC and hence the judgment and order recording of conviction under Section 354 of IPC is required to be quashed and set aside. Alternatively, he has also submitted that on examination of the evidence on record if this Court is not prepared to accept the aforesaid submission, in that event, it may be appreciated that the alleged incident had taken place prior to 14 years, that is, in the year 1984 and when the incident had taken place the appellant was aged about 17 years and 10 months, that is, below 18 years while the prosecutrix was of the age of 14 years. Both of them were minors. Because of the teenage and immaturity, the offence was committed and now both of them are married and they are leading happy married life. In these circumstances, after lapse of 10 years if the accused is sent to jail in that situation he has to remain with hardened criminals and on his return from jail probably he may also continue the bad habits and may indulge in such type of activities again. He also submitted that looking to the tender age of the appellant/accused he was entitled to the benefit under the Probation of Offenders Act. But the learned trial Judge has refused to accord the said benefit by assigning reasons in the judgment. In the facts and circumstances of the case, when 14 years have elapsed after the alleged incident, 10 years have elapsed after recording of the conviction, both the accused and the prosecutrix are very well settled in their matrimonial house and are leading happy life no useful purpose would be served by sending the accused in jail for serving out the remaining part of the substantive sentence. Moreover, the accused has already undergone imprisonment of about 25 days in jail during the pendency of bail. Therefore, the learned advocate for the appellant has

requested that while confirming the said finding if this Court shows mercy by not sending the appellant to jail again considering the period of imprisonment already undergone as substantive sentence, he is not inclined to prosecute the matter on merits.

5. I have called upon the learned APP Mr. S.T. Mehta to make his submission in this respect. According to him, it is true that when the crime was committed the appellant was below 18 years. He further submitted that having regard to his age, antecedents and the facts and circumstances of the case, appropriate orders in respect of sentence as may be deemed fit to this Court may be passed.

6. After giving by anxious and considerate thoughts to the points canvassed by learned advocate Mr. Vora for the appellant and having regard to the peculiar facts and circumstances of the case, it is clear that the incident had taken place prior to 14 years. The order of conviction was recorded in the year 1988, that is, prior to 10 years. At the time of commission of crime the appellant was aged about 17 years and 10 months which could be very well ascertained from his birth certificate produced by the appellant today alongwith his affidavit. He has also filed an affidavit saying that the appellant and prosecutrix both are married and are having children and both of them are very happy in their matrimonial life. The offence of outraging modesty of the prosecutrix was committed by the appellant/accused at his teenage and he has also undergone imprisonment for 25 days. Thereafter he was enlarged on bail. Therefore, the matter requires to be considered sympathetically.

7. In this regard this Court takes shelter of the judgment of the Division bench of this Court in the case of Dharmendra D. Soneji v. State, 1997 (1) GLR 198 wherein this Court has reduced the substantive sentence from seven years to 2 years in a rape case committed by a boy of 20 years on a girl aged about 13 years. This Court has also observed in the said judgment that the incident had taken place because of tender age and immaturity and long period of imprisonment would be detrimental to the interests of family of the accused. In that view of the matter in the opinion of the Division Bench there was more than sufficient and adequate reasons to reduce the sentence. This court also makes a reference to the judgment of the Apex Court in the case of Hanuman v. State of Haryana, AIR 1977 SC 1614. In the said case, the Supreme Court has observed that the prosecutrix somewhat exaggerated the story and,

therefore, benefit must go to the accused and the conviction under Section 354 was altered into one under Section 352.

8. Having considered the ratio laid down by the Division Bench of this Court and the Apex Court, so far as the instant case is concerned, the learned trial Judge has not believed the prosecution story with respect to rape committed on the prosecutrix by the appellant and also the story of hurt. The learned trial Judge has believed the story of the prosecutrix in respect of assault with intent to outraging her modesty. Though this Court has not examined the impugned judgment on merits this Court is of the opinion that when the incident had taken place prior to 14 years and the offence was committed by a teenaged boy who was aged less than 18 years the incident must have taken place because of immaturity for which he has already undergone imprisonment for about 25 days during the pendency of bail application, the prosecutrix and the appellant are now married and they have children and are living happily a matrimonial life if the appellant is sent to jail to serve out the remaining period of sentence naturally his three minor children and his wife would starve and being in company of hard core criminals after returning from the jail one cannot say with what impression he would come out of the jail; possibility of his doing such type of offences again cannot be ruled out. Hence, this Court is of the opinion that no useful purpose would be served if after 14 years of the incident the appellant is sent to jail and the period of imprisonment already undergone is treated as substantive sentence.

8. In the premise, if the judgment and order of recording conviction under Section 354 of IPC is confirmed and maintained and the substantive sentence of one year is reduced to the sentence undergone, the interest of justice would be served. The affidavits filed by the appellant with regard to the family circumstances of the appellant and the prosecutrix, his age and the document annexed therewith showing his date of birth are taken on record.

9. In the net result, the appeal succeeds in part. Conviction and sentence of the appellant for the offence punishable under Section 354 of IPC is confirmed. The sentence of R.I. for one year is altered into the sentence already undergone by the accused/appellant during the bail period. His bail bonds shall stand cancelled. Sureties are discharged.

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